FILE COPY

Office-Supreme Court
FILED
FEB 28 1970
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. ~~1082~~ 77

UNITED STATES OF AMERICA,
Appellant,
vs.
THOMAS WILLIAM WELLER,
Appellee.

Appeal from the United States District Court for the Northern District of California

OPPOSITION TO ~~APPELLEE'S~~ MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER FRANCK,
2905 Telegraph Avenue,
Berkeley, California 94705,
Attorney for ~~Appellant~~ Appellee.

FRANCK, HILL, STENDER, ZIEGLER & HENDON,
2905 Telegraph Avenue,
Berkeley, California 94705,
Of Counsel.

MRS. FAY STENDER
(same ADDRESS)

Subject Index

	Page
Opinion below	2
Statement	2
Discussion	3
Summary	9

Table of Authorities Cited

Cases

	Pages
Gault, In Re, 387 U.S. 1 (1967)	2
Green v. McElroy, 359 U.S. 464 (1959)	8
Kelly v. Wyman, 294 F. Supp. 893 (S.D. N.Y. 1968)	2
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	2, 3
United States v. Blue, 384 U.S. 251, 254	4, 5, 6
United States v. Eisdorfer, No. 303, this term	8, 10
United States v. Hark, 320 U.S. 536, 88 L. ed. 296	4, 5, 9
United States v. Mersky, 361 U.S. 431	4, 5, 6, 7, 8, 10
United States v. Sisson, No. 305, this term	10

Statutes

18 U.S.C. 3731	1, 3, 9
50 U.S.C. App. 451(c)	8
50 U.S.C. App. 454(a)	7
50 U.S.C. App. 455(a)(1)	7
50 U.S.C. App. 460(b)(3)	8
50 U.S.C. App. 462(a)	1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1082

UNITED STATES OF AMERICA,
Appellant,

vs.

THOMAS WILLIAM WELLER,
Appellee.

Appeal from the United States District Court for the Northern District of California

OPPOSITION TO APPELLEE'S MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

On September 19, 1969, the United States District Court for the Northern District of California, entered its order dismissing the indictment against Appellee for failure to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). On October 17, 1969, the United States filed in the District Court Notice of Appeal to this Court pursuant to 18 U.S.C. 3731. On December 18, 1969, the United

States filed its Application for Extension of Time to Docket Appeal, and on December 22, 1969, that application was granted. It thereafter filed its motion to remand.

OPINION BELOW

The opinion of the Court below is reproduced in full in the Government's Motion to Remand (Appendix, pp. 11-24).*

STATEMENT

Appellee concurs with the summary of the United States with respect to the procedures below. Appellee cannot concur with the Government in its characterization of the decision below as one of statutory construction lacking Constitutional dimensions. The opinion below (App., p. 24) concludes as follows:

> "Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress *or is constitutional.*" (Emphasis added)

In its opinion the District Court analyzed modern constitutional standards of the right to counsel as applied to analogous proceedings, including the rights of juveniles (*In re Gault*, 387 U.S. 1 (1967)), welfare recipients, *Kelly v. Wyman*, 294 F. Supp. 893 (S.D. N.Y. 1968, three judge court), and Law School graduates seeking admission to the Bar, *Willner v. Com-*

*The opinion below will be cited herein as "App., p. ....".

mittee on Character and Fitness, 373 U.S. 96 (1963). The Court then applied that analysis to the situation of a Selective Service registrant seeking conscientious objector status, making a finding that this is a critical adjudicative proceeding which has only the most highly circumscribed subsequent review. (App., p. 21.)

The Government itself points out that the issue presented by this Appeal,

> ". . . is an important and recurring one in the administration of the Selective Service laws, and should ultimately be resolved by this Court." (Application for Extension of Time for Docketing this case, p. 2.)

As a matter of law, this appeal belongs only before this Court. The laudable efforts by the Government, in its legislative proposals and in recent amendments to the Selective Service Regulations to eliminate the confusion, uncertainty and controversy surrounding the administration of the Selective Service Act can only be furthered by speedy and dispositive adjudication of the question presented by this case by this Court.

DISCUSSION

The United States points out in its introduction to the Motion to Remand that at the time it filed the Notice of Appeal to this Court, it believed the decision below was appealable directly to this Court under the "motion in bar" section of 18 U.S.C. 3731. It is manifest that under that view, appeal can lie nowhere else but to this Court. The Government concedes (p.

5) that "the questions are not free from doubts". Appellee has difficulty in seeing the doubt, either under the motion in bar section of the Criminal Appeals Act, or under the statutory construction section.

1. The motion of the Government (p. 5) states: "This Court has never decided the scope of the statutory term "motion in bar". This statement is accurate only in the narrowest sense; the Court has not decided the question of whether an order "ending the cause and exculpating the defendant" which is based entirely on matters appearing on the face of the pleadings is to be considered a motion in bar. It has decided that where the Court below goes beyond the pleadings the ruling is treated as one on a motion in bar. *United States v. Blue,* 384 U.S. 251, 254:

> "Because the dismissal by its own force would 'end the cause and exculpate the defendant,' United States v. Hark, 320 U.S. at 536, 88 L. ed. at 296, rather than merely abate the prosecution on account of some normally curable defect, one requisite of a motion in bar is met. Whether it is a further requisite that the motion introduce 'new matter' in the fashion of a plea by way of confession and avoidance need not here be decided. See United States v. Mersky, 361 U.S. 431, 441, 453, 4 L. ed. 2d 423, 431, 437, 80 S. Ct. 459 (separate opinions disagreeing on this point). For *in this instance Blue unquestionably relied on new matter* in alleging self-incrimination, so the motion qualifies even under the more stringent definition. Thus under either view of a motion in bar taken in Mersky, this case qualifies for direct review." (Emphasis added.)

That the quoted language could be written in the present case is clear. The entire Selective Service file of the Appellee was admitted into evidence and considered by the Court below. (See App., p. 11.) The opinion of the Court (App., p. 12) as well as the record of hearing on the Motion, make it clear that it was of critical importance to the Court that Appellee had duly applied to his Board for the right to have counsel present at his personal appearance, that such application had been made prior to the hearing, and that such application had been denied by the Board. Thus there can be no doubt whatsoever that the order of the Court below goes far beyond the face of the pleadings, statutes and regulations involved. As in *Blue* (supra), Weller "unquestionably relied on new matter . . ."

There is, of course, no doubt that the order below does "end the cause and [does] exculpate the defendant." *U.S. v. Hark* (supra).

The most restrictive view of the "motion in bar" is that it is identical to the common law plea in confession and avoidance (dissent in *U.S. v. Mersky,* 361 U.S. 431, 457):

> "The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution."

By suggesting that the motion below fails to fall within this definition the Government must assert

that the validity of the induction order which was contested by the motion to dismiss was a matter of *fact* and thus that appellant did in fact contest the facts alleged.

The United States has consistently and successfully taken the position that the validity of an induction order is a question of law, and not a question of fact, and that it cannot therefore be submitted to a jury.

The Government cannot expediently change its position on this question for purposes of the present proceeding. The validity of an induction order is a matter of law in a trial, and contesting its validity is not a contest of "fact" for purposes of the motion in bar section of the Criminal Appeals Act.

Quite clearly the position taken by Appellee below was that he "confessed", that he did not submit to induction, and sought to "avoid" that as an act for which he could be prosecuted by "relying on new matter which would deprive those facts of their ordinary legal effect."

Thus, there can be no doubt that even under the minority view in *Mersky* (supra), the decision of the Court below is in the nature of a "motion in bar", and it is quite clear from the opinion of Justice Harlan (who was a member of the *Mersky* minority) in *U.S. v. Blue* (supra), that where disposition of the motion below ended the cause and exculpated the defendant and where the defendant relied on new matter, the motion in bar element of the statute is fully satisfied.

2. In addition to the clear jurisdiction of the Court under the "motion in bar" section of the Criminal Appeals Act, it is also quite clear that the Government's initial position, in filing Notice of Appeal to this Court, that the decision below is based upon "the invalidity or construction of the statute upon which the indictment . . . is founded" is also clear and governing.

In *Mersky* (supra), the acts alleged to be crimes were defined by regulations which were authorized by a general statute. In coming to the conclusion that

> "the construction of one necessarily involves the construction of the other" (361 U.S. at 438), the Court looked to the statutory scheme. It pointed out that, "Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny [regulations] the means to be utilized in the effectuation of its command." (361 U.S. at 437.)

The present case involves a very similar statutory scheme. Congress authorized the President to

> "select and induct into the Armed Forces of the United States for training and service . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces."
>
> 50 U.S.C. App. 454(a).

It further provided that

> "the selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . ."
>
> 50 U.S.C. App. 455(a)(1).

Thus there can be no question that as in *Mersky,* we are dealing with a statute which is not complete in and of itself, but which authorizes and in fact requires the promulgation of regulations to fill out its scheme. The Court below, in applying the test of *Green v. McElroy,* 350 U.S. 474 (1959), analyzes the statutory and regulatory scheme. (App., p. 12.) The Court first scans the Act to find an express authorization for the denial of the right to counsel (App. pp. 13-14), it then scans the Act to find any express delegation of the power to do so. (App., p. 14.) It finds none in the Act. It then analyzes the Act for possible sources of implicit delegation of such authority. It examines Section 1(c) [50 U.S.C. App. 451(c)] and Section 19(b)(3) [50 U.S.C. App. 460(b)(3)], construing them, and finding that they are clearly "not 'explicit action by the Nation's lawmakers' (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel." (App., p. 14.) To view this analysis of the Court below as anything other than a construction of the statute, is to bend language beyond reason.

The Government's attempt to distinguish this case from *U.S. v. Eisdorfer,* No. 330, this Term, and from the positions taken therein both by the Government and by the Court, is misleading.

The Government concedes that to apply the *Eisdorfer* rationale here

> ". . . it is necessary to argue that the issue of appellee's classification, which goes to the validity of the order to report, is encompassed in the

> charge of disobedience to the order and that the regulations bearing upon the process by which the local board determined the classification in turn condition the validity of the classification."

Further, they concede (p. 9) that the District Court was justified in dismissing the indictment (once it found that the process leading to the order to report for induction was invalid). Yet they try to suggest that the dismissal was not based on a finding that the induction order was void. They seem to suggest that the decision of the Court below should be read as holding that in some metaphysical sense the order to report for induction was valid, and that nevertheless the registrant could not be prosecuted for willful disobedience of it. Even if this was conceptually valid, it is an analysis which would put the case squarely back in the "confession and avoidance" category as a motion in bar.

SUMMARY

It is undisputed by either party that the question of the jurisdiction of this Court does not depend upon how the pleading below was filed, but on "the effect of the ruling sought to be reviewed". *U.S. v. Hark,* 320 U.S. 531, 536. The analysis presented herein makes it unquestionable that within either the majority or the minority view of the meaning of the term "motion in bar", as used in 18 U.S.C. 3731, the order below was an order sustaining a motion in bar, and further that this was a decision construing a

statute, squarely within the meaning of that term as defined by this Court in *U.S. v. Mersky,* 361 U.S. 431.

It was the Government, not the Appellee which sought appellate review of this matter. The Government is, of course, free to abandon its appeal. However, so long as it pursues it, it is bound by law to the exclusive jurisdiction of this Court. As in *U.S. v. Sisson,* No. 305, this Term, and *U.S. v. Eisdorfer,* No. 330, this Term, a prompt disposition of this matter by this Court would appear in the interest of all parties and of the efficient and fair administration of the Selective Service Act.

Dated, Berkeley, California,
February 27, 1970.

Respectfully submitted,
PETER FRANCK,
Attorney for Appellant.

FRANCK, HILL, STENDER, ZIEGLER & HENDON,
Of Counsel.